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National Insecurity and Human Rights

Democracies Debate Counterterrorism

Edited by

ALISON BRYSK *and* GERSHON SHAFIR



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4 Northern Ireland

Violent Conflict and the Resilience of International Law

Colm Campbell

A state that defines itself by an ideological commitment to the rule of law (usually, though not universally, coterminous with liberal democracy) tends to behave differently from more authoritarian states. Paradigmatically, the democratic state's agents operate within the framework of legal powers that we have come to understand as Weberian "formal rationality." In practice, no state fully conforms to this model, even in peaceful times. At best law has a "relative" rather than an absolute autonomy, and some degree of illegality characterizes the operation of all states (Abel 1995). A variety of substantive, procedural, and evidential factors operate to limit the reach of the law on state action, creating mutable legal "grey zones." Norms may be ambiguous or lacking; prosecutorial discretion may shield state operatives; the judiciary may display marked deference; and illegality may involve covert operations in which links with the state may be difficult to prove, particularly where official investigations are deficient.

When the liberal-democratic state faces severe violent challenge, there is likely to be pronounced pressure to depart from formal rationality (Balbus 1977). This departure may involve the imposition of a formal, or merely de facto, "state of emergency." During such periods of emergency new legal grey zones invariably manifest, and although a revised normative framework may not mandate prisoner abuse it may in practice facilitate it. There is likely to be a rise in covert operations entailing activities such as killings, in which links to the state may be difficult to identify (as Chapter 7 in this volume discusses). The *scale* of repression is nevertheless likely to be lower in democratic than in authoritarian states, suggesting a "damping" effect (Tilly 2003; Davenport 2004). Law contributes ambiguously to this effect—its limited effective reach enables the existence of grey zones, while its remaining presence helps to delimit them.

A similar ambiguity manifests at the level of international law. While international human rights law has greatly increased in scope since the founding of the UN, derogation clauses in the major conventions make explicit provision for the declaration of states of emergency, providing for restriction on all but a small core of "nonderogable" rights (Fitzpatrick 1994). These core rights nevertheless include those most under pressure during emergencies: the right to freedom from torture and a prohibition on arbitrary killings. Yet the "bite" of human rights law in emergencies is significantly reduced by doctrines such as that of the European Court of Human Rights, which allows states a wide "margin of appreciation" (Gross and Ní Aoláin 2001). There are also significant procedural and evidential obstacles. Domestic remedies must generally be exhausted unless it can be shown that the alleged abuses constitute state "administrative practice" (Harris, O'Boyle and Warbrick 2005), and covert activities generally leave few traces.

The protection of nonderogable rights is paralleled by restrictions in international humanitarian law ("the laws of war") on torture and arbitrary killings, but the reach of this area of law can be hampered by a separate issue: state sensitivity about acknowledging that "armed conflict" exists. Humanitarian law sanctions killing "combatants" (though the phrase is used only in relation to international armed conflicts) and might therefore be perceived to free the state's hands on the use of lethal force. But the law's application might also seem to convey status on violent challengers, either informally, or in the case of conflicts meeting particular technical requirements, by the formal award of "prisoner of war" status. From the state's point of view two alternative optimal results suggest themselves. The first is to recognize the existence of armed conflict (facilitating use of lethal force), while denying that challengers meet technical requirements for prisoner-of-war status. The second is to deny the existence of armed conflict while exploiting domestic law grey zones to employ the kind of lethal force against violent challengers that international humanitarian law permits against "combatants." If humanitarian law is ultimately judged applicable, the deaths may not have been in violation, particularly if when killed, challengers were taking "a direct part in hostilities," (though a violation of international human rights law may have occurred; see generally Kretzmer 2005).

Sensitivity around normative framing highlights that in many situations there exists not only violent conflict, but also "metaconflict"—that is, conflict about the conflict (McGarry and O'Leary 1995: 1). Claims about appropriate international legal norms are themselves claims about the conflict's nature. At one level, international law provides an external framework

for evaluating conflict; at another, international law can be *within* conflict, helping to shape the identities and behavior of protagonists (Berman 1997). Conceptualization of international law as simply a set of objective norms offers limited potential to capture this dynamic. Much better possibilities are presented by viewing international law as a process "in which context is always important" (Higgins 1994: 8). Contextualization offers the possibility of taking account of the impact of conflict on the interpretation of international law; it also allows for the possibility that the nature and standing of particular states might impact on the law's bite. This is not to adopt a realist dismissal of international law as nothing more than power politics in disguise. Rather, it assumes a much more complex relationship between power and international law, in which the latter enjoys a significant degree of autonomy, while recognizing that international law can shift, and that powerful states can play particularly important roles in the change process.

Contemporary debates on terrorism, international law, and U.S. hegemony raise these questions in their sharpest form. While some have seen in the exercise of hegemonic power a rejection of the viability of international law (at least in its capacity to limit the hegemon; Bolton 2000), others have suggested that the optimal position for the hegemon may be neither to dismiss international law, nor to create a special regime for itself, but rather to shape international law in a way that furthers its own interests (Byers 2003). A project such as this is greatly assisted by the capacity of the hegemon not simply to shape the content of norms, but also to influence the identification of the appropriate normative framework.

This chapter uses the British experience in Northern Ireland to explore the international law dimension of protracted violent political conflict in a leading Western state with a formal commitment to the rule of law. While the Northern Ireland conflict differed in many respects from the current "war on terror," there are also points of correspondence (explored further below), making analysis of the example especially valuable for three reasons. The first has to do with shifting contextualization: the Northern Ireland conflict offers the advantage of having a beginning, a middle, and something like an end. Each of those phases can be considered to contribute to the context within which the behavior of the state can be judged and in which different degrees of leeway may be shown by the international community.

The second is that while the UK has not occupied the position of global hegemon since the nineteenth century, there are reasons for suggesting that its subsequent international standing has had hegemonic resonance. The effects of a period of hegemony may continue in complex ways, long after the power of the hegemon has waned (Keohane 1984). Britain remains a

nuclear power with a permanent UN Security Council seat; it also played a key role in the creation of the European Convention on Human Rights (ECHR) (Simpson 2001).

Third, as Chapter 5 also emphasizes, current British antiterrorist legislation draws heavily on Northern Ireland experience, and the state has attempted to highlight the lessons of this experience in its "special" (if unequal) relationship with the United States. Particularly since the Suez crisis (1956), a key driver in British foreign policy seems to have been a perceived need to act in concert with the United States (Hourani 1989). Especially since 9/11, the UK has been facilitative of the exercise of American hegemony; in doing so it has been keen to project as capable of influencing the United States in a way that few countries can (albeit with little supporting evidence).

The first part of this chapter provides a backdrop for exploring the international law dimension of Northern Ireland's "Troubles," outlining domestic legal frameworks and security strategies adopted during the conflict's three main phases: outbreak and militarization (1968–1976), criminalization (1977–1994), and transition (1995 to the present). The international law analysis that follows is loosely structured around these phases, beginning with explorations of approaches employed by the UK in combating early Irish government attempts to raise Northern Ireland at the UN, and of British strategies in relation to international humanitarian law. This is followed by an analysis of the case law under the ECHR using the derogation cases as the main focus during the criminalization phase, and those in relation to the investigation of lethal force as the principal topic during the transition. The chapter then explores the extent to which the British experience in relation to the international law dimension of the Northern Ireland conflict may be applicable in relation to the U.S. experience in its "war on terror."

Overall, I address three salient issues. The first is the extent to which the standing of the British state may have impacted upon judgments of its behavior in Northern Ireland. The second is the extent to which changing contextualization over time may have impacted upon this adjudication, with particular reference to state activities in grey zones of domestic law. The third is the extent to which any of this analysis may be applicable to the United States, now or in the future, given its hegemonic position.

DOMESTIC FRAMEWORKS

With over 3,500 deaths in a population of 1.5 million, Northern Ireland was easily Western Europe's most violent conflict in the post–World War II

period. Though subject to an ambiguous claim by Ireland until 1998, Britain exercised sovereignty over the region, which in its constitutional law was part of the UK. Devolved government existed until 1972, with a separate legal system (still subsisting), and with emergency legislation (the "Special Powers Act") in force from the state's foundation (Campbell 1994).

The first phase of the conflict, (1968–1976) began with a civil rights campaign on behalf of a disadvantaged nationalist minority. A deteriorating public order situation saw the deployment of British troops in 1969 and the re-emergence of highly violent, and frequently quite structured paramilitary groups. The nationalist Irish Republican Army (IRA) sought re-unification with Ireland, while loyalist groups such as the Ulster Defence Association saw themselves as defending the union with Britain.

Internment without trial under the Special Powers Act was introduced in 1971. The legislation was replaced in its entirety by the Northern Ireland (Emergency Provisions) Act of 1973 (EPA), which provided for the continuation of indefinite detention and for the trial of terrorist-type offences in juryless, single-judge courts with special rules of evidence calculated to facilitate the use of interrogation-based confessions. In addition, a host of ancillary stop, search, arrest, and detention powers were given to the police and the army. From 1974 these were supplemented by a UK-wide Prevention of Terrorism (Temporary Provisions) Act (PTA), introduced following indiscriminate IRA pub-bombings in England. This provided for seven-day detention without charge and a system of executive-imposed "exclusion orders" (somewhat akin to internal exile).

Following the introduction of indefinite detention in Northern Ireland came a rash of claims of severe prisoner abuse (which I examine further below). There were also well-documented claims of abusive use of lethal force by the army. In addition to the statutory framework governing the latter issue, there existed an opaque range of nonstatutory (common-law) powers. At one point these had been invoked in a manner that came close to a form of martial law (Campbell and Connolly 2003). Furthermore, special rules on inquests hindered public scrutiny of the use of lethal force; prosecutions of security force personnel were rare, and convictions even rarer (Ní Aoláin 2000). The picture that emerged was of significant legal grey zones: many security force activities were characterized by ambiguous or absent legality, and infractions upon norms by these forces led to few criminal sanctions.

The second, "criminalization," phase (1977–94) saw a shift in which the military lost its lead role under a doctrine of "police primacy." Trial in Diplock courts assumed a central place in the government's security strat-

egy, as internment had been abandoned in 1975. During the earlier phase, the security strategy had appeared to hover between war and criminal justice models. Criminalization marked the formal dominance of the latter, though attempts to treat prisoners as "ordinary criminals" were severely dented by the IRA's 1981 hunger strike, and elements of the war model appeared to survive in aspects of security apparatus behavior.

Under criminalization, the kind of highly *visible* egregious abuses that had characterized the earlier period were largely absent; if anything, though, covert activities appeared to increase in importance. What occurred was a succession of security initiatives, each of which raised concerns of abusive behavior. As pressure created by human rights NGOs forced the abandonment or alteration of particular strategies, further concerns arose; the overall pattern was one of displacement rather than elimination of abuse.

Some concerns involved questions about the fairness of Diplock trials; others involved continuing claims of prisoner abuse. In addition, there were two patterns of incidents in the 1980s and 1990s implicating the security apparatus in suspicious killings, raising a variety of concerns about "shadow state" activities. The first involved situations in which specialized units seemed to operate a "shoot-to-kill" policy of eliminating (generally armed) terrorist suspects in planned ambushes (Urban 1993). In effect, it appeared as though in these instances the security forces were operating according to laws-of-war rather than criminal justice standards. The second pattern involved some well-documented cases in which it appeared that elements in the security apparatus were colluding in assassinations with loyalist paramilitaries. The victims appear to have included a number of IRA suspects, some civilians, and two of Northern Ireland's leading human rights lawyers (J. O'Brien 2005).

The third phase is one of transition, beginning with the paramilitary ceasefires of 1994, and continuing with the 1998 Good Friday Agreement (Campbell, Ní Aoláin, and Harvey 2003). There has been a gradual reduction in the use of emergency and antiterrorist powers. Military deployment has greatly diminished; police reform (or possibly transformation) has proceeded (though some elements of the security apparatus have emerged unscathed or even strengthened); and the "past" has emerged as a major area of concern, with a particular focus on dealing with the legacy of disputed security force activities, particularly killings, that fell into legal grey zones (Bell 2003).

Legislatively this period has been one of consolidation. Security discourses and the structure of legislation in the earlier phases of the conflict

tended to emphasize the exceptionality of Northern Ireland-related terrorism, and the temporariness of antiterrorist measures (the 1970s and 1980s saw a succession of EPAs and PTAs). This reflected London's generalized sense of Northern Ireland's "separateness," helping to explain why much harsher measures were tolerated locally than were employed in Britain itself. In succeeding decades, while the separateness persisted, the approach to legislation changed. "Emergency" powers gradually seeped into "ordinary" powers applicable throughout the UK, and violence in Northern Ireland became partly subsumed under the general (domestic and international) rubric of the "terrorist threat." Accordingly, the bulk of the powers previously found in the EPA are now located in the part of the Terrorism Act of 2000 that applies only in Northern Ireland. That act was subsequently amended with respect to Northern Ireland and has been supplemented by a raft of more general, post-9/11 legislation analyzed by Todd Landmann in Chapter 5 of this book.

NORTHERN IRELAND: INTERNATIONAL LAW CONFLICTS

This domestic law framework sat alongside an extensive web of UK treaty commitments with respect to international law (including human rights law), reflecting Britain's significant status in the international law arena. From today's perspective, the international legal reference points framing the Northern Ireland conflict seem relatively well defined (principally by reference to the ECHR), but the position at the conflict's eruption was less clear. Most importantly, an assertive Irish government displayed a willingness to use UN mechanisms in an attempt to internationalize the issue. A further factor was that militarization in Northern Ireland overlapped with the opening of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law in Armed Conflicts, which continued from 1974 to 1977 (Moir 2002). The conference's concern with unconventional armed conflicts posed implicit questions about Northern Ireland's categorization. Given the UK's formal commitment to international law, and its questionable Northern Ireland record, the challenge it faced was to manifest engagement with the law while short-circuiting potential criticism; how to avoid rather than evade condemnation?

Eruption: Northern Ireland at the United Nations

Interactions between the UK and Ireland at the UN at the start of the conflict are best seen as a metaconflict in which both states sought to use international legal reference points to bolster competing narratives about the

conflict. In a situation of deteriorating public order, the Irish government in 1969 requested an urgent meeting of the Security Council, calling for the dispatch of a UN peacekeeping force to Northern Ireland (Ireland 1969). This request was repeated in the address by the Irish minister to the Security Council when the procedural question arose of the possible inclusion of the Irish letter on the Council's provisional agenda. His address emphasized the government's policy in relation to Northern Ireland, which was that the state did "not in any way concede to . . . [the UK] the right to exercise jurisdiction there," implying that the domestic affairs exception in Article 2(7) of the Charter was inapplicable. Alternatively, he suggested, drawing parallels with UN approaches to apartheid, that British objections be overridden. The UK response was to insist that Article 2 operated to preclude UN involvement. Despite Soviet support for the Irish position, the meeting was adjourned without taking a decision on whether to adopt the suggested provisional agenda, and the matter was dropped.

Ireland then sought to have its concerns included on the agenda of the forthcoming UN General Assembly session. Its request referred to the UN Decolonization Declaration (resolution 1541, adopted in 1960), and asked that Northern Ireland be examined with a view to ending discrimination and establishing human rights, citing various articles of the Charter. The item made it on to the provisional agenda, but following a British objection that debate was precluded under Article 2(7), further discussion was deferred, and the issue died. Thus in both instances, the UK used procedural devices to foreclose discussion of substantive issues. In effect, the British narrative of the conflict ("an internal matter") won out at the Security Council and General Assembly.

International Humanitarian Law: Closing the Door

Given the sustained and organized nature of the violence in Northern Ireland, humanitarian law might seem an obvious reference point for assessing the behavior of participants. This was particularly the case in the early 1970s, given the intensity of the fighting and the control of "no go" areas by nonstate entities. In fact, for much of the conflict there was little attempt to view violence through the lens of humanitarian law, apart from an occasional airing in the context of the status of IRA prisoners (Walker 1986), and some later attempts by human rights NGOs to monitor paramilitary activity by referring to humanitarian principles (Human Rights Watch 1991). There was therefore limited examination of the potential applicability of humanitarian law provisions governing guerrilla or noninternational armed conflicts (principally Common Article 3 of the 1949

Geneva Conventions, and the conventions' two 1977 protocols). In general, the Northern Ireland conflict tends to be viewed as having hovered between some form of noninternational armed conflict (governed by Common Article 3 and meeting at least some of the requirements of Protocol II of 1977), and the lower intensity category of "situations of internal disturbances and tensions."

The important point is that while the applicability of the law during the conflict is an open question, the UK nevertheless took considerable pains to avoid the possibility of creating fresh obligations. This wariness appears to have been based on a combination of diffuse and quite specific status concerns. If "armed conflict" existed, the state was a *participant* in it, as indeed were armed opposition groups. At a more specific level, there appear to have been concerns about 1977 Protocol I, which granted prisoner-of-war status to combatants captured in conflicts where "peoples are fighting against colonial domination and alien occupation . . . in the exercise of their right of self-determination . . ."¹

In retrospect, although self-determination claims were important elements in the Northern Ireland conflict (and its resolution), it is difficult to see how Protocol I's conditions of applicability could be said to have been met. As regards procedural issues surrounding international exploration of a possible "colonial" dimension to the conflict (with obvious implications for the applicability of Protocol I), Britain's influential position at the UN again came into play. When between 1988 and 1990 the U.S.-based Brehon Law Society sought to have the UN Decolonization Committee interest itself in Northern Ireland, the Committee insisted that its mandate meant that it would require a resolution of the General Assembly or a referral by the Secretary General before it could hold hearings on the region (M. O'Brien 1996; Harvey 1990). No such resolution or referral was forthcoming.

Protocol II did not grant prisoner-of-war status but did provide for prisoner release at the conflict's end. These provisions, though, were binding only in noninternational armed conflicts which met the protocol's high thresholds for applicability. Although the UK was an early signatory of both protocols, it declined to ratify them for many years, and at the time of signing it made a declaration with respect to Protocol I (Roberts and Guelff 1989), aspects of which appear designed to negate its possibility of applicability to Northern Ireland.

Eventually, the Geneva Conventions (Amendment) Act of 1995, enacted a year after the Northern Ireland cease-fires, provided for ratification of the protocols (Rowe and Meyer 1996). The legislation was not immediately brought into force. Ratification was eventually accomplished only in

January 1998, the IRA cease-fire having been ended and restored in the meantime, suggesting that the imperative to avoid arguments over the applicability of the protocols to violence in Northern Ireland played a part in British calculations. Furthermore, ratification was accompanied by a number of reservations in respect of Protocol I, which although textually different from the earlier declaration, also seemed designed to exclude any applicability to Northern Ireland. As regards Protocol II (the applicability of which was a more likely bet), while the UK has never indicated that it viewed the conflict as coming within the instrument's terms, it could, if it felt mindful to do so, make a claim that the early release of prisoners under the Good Friday Agreement met the amnesty requirements of the protocol.

At one level, the strategies pursued in relation to Northern Ireland at the higher reaches of the UN and with respect to international humanitarian law functioned as straightforward shielding devices for the UK. At another, they can be considered effective contributions to the metaconflict. As such, they confirm that particularly at conflict's outbreak, leading Western states are well placed to define international legal frameworks and contexts in ways favorable to their interests.

Derogation and the Entrenchment of the Conflict

The international humanitarian law concept of "armed conflict" overlaps but is not coterminous with that of "public emergency threatening the life of the nation" in derogation articles of human rights treaties. While the occurrence of armed conflict in a particular area would amount to such a threat to the nation's life, violence at a level not technically amounting to armed conflict might yet constitute an emergency. It was this distinction that allowed Britain to claim that although there was no armed conflict in Northern Ireland, there was a "public emergency" under Article 15 of the ECHR and Article 4 of the International Covenant on Civil and Political Rights (ICCPR). The distinction was an important one on several levels. While humanitarian law's possible applicability raised awkward question of status, few such issues arose with derogation; rather, the mechanisms were essentially facilitative for the state.

Conceptually, the term "emergency" is locked in a dichotomous relationship with the norm against which it is defined. Implicit in this relationship is the temporariness of emergency. Were emergency not temporary, there could be no norm. This relationship has been variously described in terms of a governing paradigm of "normalcy-rule, emergency-exception" (Gross 1998: 440), or of the "implicit counterpoint between emergency and normality," producing the "emergency/normality" antimony (Marks 1995: 85).

Northern Ireland fits uneasily within this conceptual framework, since from its foundation the state has been in a permanent emergency. Having ratified the ECHR in 1951, the UK derogated in 1957, and continuous derogations were in force until 1984. The 1984 derogation withdrawal was not marked by an abandonment of emergency legislation, and when in 1988 the legislation's detention provisions were found to be in breach of the convention, further derogations were entered which were kept in place until 2001. Although fresh derogations were entered later that year (subsequently withdrawn), these were focused not on Northern Ireland, but on international terrorism.

The most important issues aired under Council of Europe mechanisms in the early period involved allegations of the abuse of prisoners who were detained without trial in 1971–72. These cases prefigured in many respects the debate on “torture lite” and “torture heavy” in the recent “war on terror.” The interstate case *Ireland v. UK* (involving “torture lite”) focused mainly on the use of the “five techniques” of “interrogation in depth”: hooding, wall-standing, food deprivation, sleep deprivation, and the use of “white noise” (though allegations of more traditional brutality also figured).² The European Court of Human Rights found that the “five techniques” had been approved at a “high level” and therefore constituted administrative practice. While conceding that a public emergency existed at the time, Ireland claimed *inter alia* that the scale of detention was not strictly required, and that the techniques to which some of the detainees had been subjected amounted to torture, and therefore to a violation of a nonderogable right.

The court’s decision has been analyzed extensively elsewhere; rather than reproduce this criticism here, two aspects of the judgment will be highlighted. The first is the degree of deference shown to the state’s estimation of the situation. While the court accepted its duty to decide whether an emergency justifying resort to derogation existed, it accompanied this with a strong validation of the doctrine allowing states a “margin of appreciation.” This paved the way for the finding not only that an emergency existed, but that detention without trial on the scale involved was not in violation of the convention, and that there was no discrimination in its operation.

The second notable feature was the finding by the majority in relation to the “five techniques” that the state had inflicted inhuman and degrading treatment upon the detainees (and therefore had violated a nonderogable right under Article 3 of the ECHR), but—in contrast to the earlier finding of the European Commission on Human Rights—that this did not amount

to torture. This was despite a finding by the court that the techniques' application caused "at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation."³ Nevertheless, their use "did not occasion suffering of the particular intensity and cruelty implied by the word torture." Three judges dissented on this point, arguing in separate opinions that use of the "five techniques" constituted torture.

Another set of allegations (with "torture heavy" resonance) was aired in the *Donnelly* case,⁴ involving seven applicants, several of whom had received substantial compensation payments. The aspects of ill treatment in *Donnelly* have been discussed primarily in relation to allegations of physical brutality (several applicants were hospitalized), and secondarily in relation to allegations by three applicants that interrogators secretly administered mood-altering drugs (Boyle and Hannum 1972, 1976, 1977). A third category of claims has heretofore attracted little attention, though events in Abu Ghraib now put it in a different light: one of the detainees described being made to "bark like a dog" and squat on all fours, and being subject to a serious sexual assault (a brush shaft forced into his rectum).

In a somewhat technical decision, the European Commission ultimately ruled the case inadmissible. There was no administrative practice because toleration of the alleged activities had not been shown to exist at a sufficiently high level of the state apparatus: toleration "at the middle or lower levels of the chain of command . . . does not . . . necessarily mean that the state concerned has failed to take the required steps to comply with its substantive obligations" (p. 85). That police investigations of complaints had taken place was seen by the commission as crucial, despite accepting that no successful prosecutions were mounted, that the investigations were "open to criticism," and that at least some were "incomplete" (p. 83). This approach seemed much more indulgent to state claims than is evident in the *Greek* case, which involved prisoner abuse at the time of the Greek military junta of 1967-74,⁵ suggesting that the democratic character of the British state may have been implicitly factored into the commission's assessment.

In *Ireland v. UK* the structure of adjudication had been predicated upon the viability of the emergency-normality dichotomy. This was perhaps understandable given that the case arose from the early stages of the Troubles, but by the 1980s increasing entrenchment of the emergency raised the question of its continuing appropriateness. The issue was revisited in *Brannigan and McBride v. UK*,⁶ which saw a challenge to the PTA provisions allowing detention of terrorist suspects for up to seven days, a power relying upon a derogation from Article 5(3) of the ECHR.

Given that the Northern Ireland emergency was in at least its twentieth year when the detentions complained of took place, an obvious question mark arose over the viability of the kind of analytical and evaluative approaches evident in *Ireland v. UK*. Although permitting a wide margin of appreciation may be understandable in the turbulence of a sudden onset of emergency, and for a limited period, such a rationale largely disappears in an entrenched and relatively predictable (though violent) situation. Accordingly it was argued before the court that if a state is to be allowed a margin of appreciation, that margin should become narrower the longer the "emergency" continues.

Rather than engage meaningfully with this argument, the court fell back on stock phrases, validating the claim that a "wide margin of appreciation" should be granted to the state in assessing both the existence of the emergency and the measures taken on foot of it. This paved the way for the validation of the regime in the interrogation centers.

Although the finding that the level of violence in Northern Ireland threatened the life of the nation might be considered unremarkable, the validation of the safeguards in the interrogation centers is quite another matter, and was out of step with the approach taken in other international forums. In its consideration of the first periodic report of the UK under the Torture Convention in 1991,⁷ members of the UN Committee against Torture subjected the safeguards in the interrogation centers to scathing criticism. Criticisms continued in later periodic reports. In 1993 the Council of Europe's European Committee for the Prevention of Torture was sufficiently concerned at the situation in the "holding centers" that it judged a visit to Northern Ireland "to be required in the circumstances," after which it issued a highly critical report. Following a further intervention in 1999, it issued a (successful) call for the closure of the main center.

In *Brannigan and McBride*, therefore, the European Court afforded a degree of deference to the UK that other international human rights bodies were unwilling to display. The general deference to state claims displayed by the court was also much greater than that afforded to Turkey in *Aksoy*,⁸ in which the safeguards applicable to the extended detention of terrorist suspects were found to be inadequate. This again suggests that the liberal-democratic character of the British state (in contrast to Turkey's flawed democratic record) may have been implicitly factored in to the court's assessment. Although occasionally a more stringent approach to the use of emergency powers has been evident from ECHR organs,⁹ subsequent case law has tended to dampen expectations that such cases opened a route to innovative challenge to state action (at least while violence continued).¹⁰

Transition and the International Law Context

Although ECHR jurisprudence on Northern Ireland up to 1994 showed considerable deference to state claims, it has been markedly different since. Of the fourteen conclusive rulings available at the time of writing, thirteen found state breaches.¹¹ For illustrative purposes this essay focuses on one subset, those relating to deaths caused either by direct security force action or where it was alleged that security forces had acted in collusion with loyalist paramilitaries.

Given the extent of the sea change in European adjudication, any worthwhile explanation is likely to be multifactorial, but one factor, timing, cannot be ignored. All judgments were handed down after the start of the transition in Northern Ireland that began with the 1994 paramilitary cease-fires and has continued to the present by way of the 1998 Agreement. Although the language of "transition" has not been invoked explicitly by the European Court, it is difficult to avoid the conclusion that the changed Northern Ireland context has been factored in to some degree.

In at least four respects this jurisprudence marks a departure from previous European case law on Northern Ireland. The first relates to context. The *Gibraltar* case involved the shooting dead by SAS troops, in a pre-planned operation, of three IRA members who were believed to be involved in an overseas bombing mission but who were subsequently found to have been unarmed. In assessing the killing, the court explicitly mentioned the context of terrorism, but in effect viewed this context as being trumped by the primacy afforded to the "right to life" (Article 2 ECHR). This approach was markedly different from that taken by ECHR organs in earlier lethal-force cases from Northern Ireland, in which considerable leeway had been afforded to the state.¹² This suggests that the primacy attached to Article 2 itself reflected a changed broader context.

The second departure is a shift in focus away from the instant of killing toward structural and procedural issues, either preceding the killing or in subsequent investigations. For instance, in *Gibraltar* a substantive breach of Article 2 was found in which the authorities were judged to have committed errors in planning, control, and organization before the killings. In others, breaches of the procedural requirements of Article 2 were found on the basis of inadequate investigations of deaths. A critical effect was that the focus of responsibility was shifted from the direct perpetrators toward those higher up the chain of command, inviting the question of ultimate responsibility for "shadow state" activities.

The third departure is an extension of concern with killings caused

directly by security force personnel to killings alleged to have resulted from collusion between security force members and loyalist paramilitaries. The political sensitivity of such killings cannot be underestimated, given their "dirty war" resonance. Breaches of the procedural requirements of Article 2 of the ECHR were found on the basis of the lack of a prompt or effective investigation into allegations of collusion, the lack of independence of the police officers investigating the incident from the security force personnel allegedly implicated in collusion, and the exclusion of the collusion issue from the scope of the inquest. Among the investigations impugned in these rulings was the one concerning the assassination of the human rights lawyer Pat Finucane.

A final point of departure from past approaches is the "fit" between the Northern Ireland, Turkish, and Chechen cases. The divergence between *Brannigan and McBride* and *Aksoy* has already been noted; by contrast, the jurisprudence evident in cases such as *Shanaghan* and *Kelly* meshes virtually seamlessly with *Kaya* and similar rulings from Turkey,¹³ and with judgments in the Chechen cases brought against the Russian Federation.¹⁴ This suggests an erosion of the perception that the Northern Ireland experience is exceptional.

The picture that emerges is one in which international law increasingly reaches into former grey-zone state activity. Similar approaches have been evident in recent case law covering the relationship between the fair trial and the interrogation regime, and relating to the protection of intelligence sources. This suggests that the "pull" of the state on the law is affected by context. While conflict continues, human rights law may display a variable tendency to accommodate itself to the requirements of powerful democratic states, but absent violent challenge, the situation may be partly reversed, with human rights law displaying an increasing pull on the state, even in relation to retrospective judgment on acts committed during the former conflict.

WHAT LESSONS FOR THE "WAR ON TERROR"?

There can be no simple transposition of the Northern Ireland experience to the global conflict. Assessment of whether any lessons are applicable must take account of both similarities and differences. Some elements suggest the viability of comparison: both the United States and UK are liberal democratic states; both conflicts have involved structured political violence with complex ethnic and religious dimensions; the long-standing alliance between the two states has resulted in significant ongoing exchanges of

security experience; and both states have similar (common law) legal systems, with relatively robust judiciaries.

Yet there are also important differences. Most obviously the "war on terror" raises questions about the use of force in international law, absent in Northern Ireland, and the United States occupies the position of a global hegemon, much different from the standing and interests of the UK during the Northern Ireland conflict. Other important differences relate to the nature of the threat, to conflict categorization, and to domestic and international legal frameworks.

The nature (and possible novelty) of the contemporary threat have important implications for the leeway likely to be initially allowed to the state (the "margin of appreciation" in ECHR jurisprudence). In that regard, five differences between the conflicts can be noted. Al Qaeda's structures and goals appear much more diffuse than those of groups such as the IRA, affecting a much larger number of states. While Northern Ireland saw some appalling atrocities by nonstate entities, the overall percentage of civilian casualties tended to be significantly lower than in many al Qaeda attacks. Al Qaeda has made extensive use of suicide bombers, posing interdiction problems that were not present in Northern Ireland, and there have been persistent claims that al Qaeda is intent on employing weapons of mass destruction (though its actual attacks have been technologically low level).

Turning to conflict categorization, the UK, after some initial ambiguity, was careful to construct a narrative of its behavior in terms of a criminal-justice-based response to "terrorist criminality" (despite significant militarization). This entailed rejection of a "war" formulation, even if elements in the security forces seem to have exploited legal grey zones to engage in some activities, such as killings and coercive interrogations, typical (though not all legitimate) in wartime. By contrast, the United States has been prolix in the depiction of its activities variously as the "*war on/against terror(ism)*," or more recently the "*long war*," formulations sufficiently broad to cover the 9/11 attacks, the conflicts in Afghanistan and Iraq, and antiterrorist initiatives at home and abroad, neatly eliding war-as-metaphor with war-as-armed-conflict.

As regards international humanitarian law, both the United States in the current conflict and the UK in Northern Ireland sought to avoid conferring prisoners with actual or perceived status, but there are important differences in approach, corresponding to the alternative optimal strategies (from the state's perspective) outlined earlier. The British approach, consistent with its criminalization strategy, was to deny the applicability of humanitarian law while seemingly making some use of lethal force with varying degrees of

(unacknowledged) accordance with "laws of war" standards. The U.S. approach, following from its "war" rhetoric, has entailed assertions that the "laws of war" entitle it to use lethal force against suspected terrorists, while resisting claims that detainees such as those from the Taliban met the technical requirements for prisoner-of-war *status*.

With respect to other areas of international law, the two states differ in their scale of human rights treaty ratification. The UK has ratified a wide range of treaties including the ECHR, which provides for individual complaints. The United States is subject to the individual complaint mechanism of the Inter-American Commission on Human Rights through the OAS charter and the American Declaration of the Rights and Duties of Man. By contrast, the United States has declined to ratify (though it has signed) the American Convention on Human Rights. It has, however, ratified the ICCPR and the UN Convention against Torture (and is therefore subject to these conventions' reporting requirements); it is also a party to the UN Charter and subject to UN thematic human rights procedures. The United States has declined to invoke the derogation mechanisms under the ICCPR. Its formal position is that activities necessitated by the "war on terror" fall outside international human rights law. This view has been rejected by UN human rights bodies, which have been heavily critical of U.S. treatment of terrorist suspects.

The overall result has been the creation of deliberate ambiguity and confusion about the reach and interrelationship of legal norms in the current conflict. Whereas some have seen in this the attempted creation of legal "black holes" (Steyn 2004), others have pointed to continuing reliance by the United States on legal classification and representation, even in regimes such as that at Guantanamo (Johns 2005). Rather than representing a completely new phenomenon, the U.S. approach in the "war on terror" may be considered a particular example of attempted exploitation of legal "grey zones," bearing some similarities to (and differences from) the British experience in Northern Ireland (Campbell and Connolly 2006).

Inevitably, this comparison raises the question of the relationship of the hegemon to international law. It is unnecessary for the purposes of this essay to go into the voluminous current material on "hegemony"; suffice to say that the literature tends to identify at least two major uses of the term at the international level, with divergent views on the relationship of the hegemon to international law (Byers & Nolte 2003; Byers 2003; Vagts 2001; Krisch 2005). One tends to emphasize hegemony as "dominance," with connotations of unilateralism in international affairs, and a dismissive "realist" approach to the question of the capacity of international law to bind the hegemon. The second focuses on more subtle exercise of power, emphasiz-

ing the long-term desirability for the hegemon of employing multilateralist strategies. On this view, as discussed above, the optimal position from the hegemon's perspective may be to employ, and attempt to shape, international law in a way calculated to advance its interests.

If, ultimately, the exercise of hegemonic power by the United States approximates the former model, the British experience in Northern Ireland offers few pointers. If, however, the latter model prevails, the hegemonic resonance of the UK's status may offer some valuable clues. Powerful states may be well placed to influence the metaconflict in a way that furthers their interests, and adjudication of applicable legal norms displays a tendency to accommodate itself to the state's interests. Varying contexts, however, can lead to international law's displaying significant resilience. This may create challenges for attempts to invoke international law to buttress hegemony; the possibility of law-based challenge will be continually present, with shifting contextualization potentially increasing its chances of success.

The example of Northern Ireland suggests that the UK's liberal-democratic character, coupled with its strong international standing, resulted in its being granted greater leeway during violent conflict by international human rights mechanisms than were countries with lesser democratic credentials. This leeway, while not unlimited, operated to shield state activities in domestic legal grey zones. In the postconflict environment, the context of terrorism was still taken into account when adjudicating actions from the past; that context, however, seems to have been partly trumped by the implicit context of transition since 1994.

These assessments suggest three tentative propositions about the bite of international law in relation to the "war on terror." First, particularly in the early stages of conflict the United States could be expected to be afforded considerable leeway in assessing the extent of the threat and of the necessary response. This is particularly the case in view of the relative novelty of al Qaeda's structures and tactics. Second, as the conflict persists the state is likely to attract increasing criticism, both through treaty-based reporting requirements and from thematic human rights mechanisms focusing on patterns of abuse, particularly in relation to such nonderogable rights as the prohibition on torture.

These two propositions help to explain why, immediately after 9/11, international mechanisms were so facilitative of U.S. approaches, and why human rights criticism of the "war on terror" was initially so muted. But it also helps to explain why, as the "war" has continued, increasing friction in international mechanisms has become apparent.¹⁵

The third proposition is based upon the assumption that, like the "Hundred Years' War," the "long war" (or parts of it) will eventually come to an end of sorts. Such a transition from violent conflict may produce critical ex post facto judgments on how the "war" was pursued. It may be, therefore, that the bite of international human rights and humanitarian law will increase significantly, if in part retrospectively.

presidents control over C.I.A. interrogation methods and to allow the government to present some evidence in military tribunals that is based on hearsay or has been coerced from witnesses.”

86. In the Arar decision, a U.S. court deferred to the executive and refused to allow a claim about U.S. responsibility for the torture of a Canadian in Syria, prioritizing U.S. relations with Canada rather than an individual right not to be tortured.

87. Shortly after the Hamdan decision, the U.S. government issued a new version of interrogation rules applicable to the military, and announced the transfer of fourteen persons previously held in secret detention to the facility at Guantanamo. These actions had the combined effect of placing “high value” detainees under the legal protection of part of the laws of war. This had been explicitly rejected by the Bush administration in 2001.

88. Neil MacFarquhar, “Lebanese Would-Be Suicide Bomber Tells How Volunteers Are Waging Jihad in Iraq,” *New York Times*, November 2, 2004, A10.

89. According to many press reports, the Bush administration relied on a prisoner’s “confession” that Iraq under Saddam Hussein had engaged in operational contacts with al Qaeda. According to these same reports, the confession was extracted under torture and later recanted. If true, the reports indicate one of the negatives about use of abusive interrogation. Saddam’s purported links to al Qaeda were often mentioned by the administration, especially Vice President Cheney, as one of the primary justifications for the March 2003 invasion. No reliable proof has yet surfaced about these asserted contacts.

4. CAMPBELL, NORTHERN IRELAND

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1. Art. 1.4.
2. 25 Eur. Ct. H.R. (Ser. A) (1978).
3. 2 EHRR, p. 80.
4. *Donnelly and Others v. UK*, Application 5577, 5583/73, Decision of the Commission, April 5, 1973.
5. *The Greek case* (1969) 12 YB 1.
6. (1994) 19 EHRR 539.
7. Committee against Torture, Consideration of Reports Submitted by State Parties under Article 19 of the Convention, Initial State Reports Due in 1990, Addendum United Kingdom, para. 67, UN Doc. CAT/C/9/Add.6.
8. *Aksoy v. Turkey*, 23 EHRR 553 (1996)

9. See *Fox, Campbell and Hartley v. UK*, (1990) 13 EHRR 157, and more ambiguously in *Brogan v. UK* (1989) 11 EHRR 117.

10. Contrast *Fox, Campbell & Hartley v. UK* with the subsequent decision in *Margaret Murray v. UK* (1994) 19 EHRR 193. See also *O'Hara v. UK*, (2002) 34 EHRR 32.

11. *McCann and Others v. UK*, (1996) 21 EHRR 97; *John Murray v. UK*, (1996) 22 EHRR 29; *John Tinnelly & Sons Ltd. and Others and McElduff and Others v. UK*, (1999) 27 EHRR 249; *Averill v. UK*, (2001) 31 EHRR 36; *Magee v. UK*, (2001) 31 EHRR 35; *McKerr v. UK*, (2002) 34 EHRR 20; *Shanaghan v. UK*, Appl. no. 37715/97; *Kelly and Others v. UK*, Appl. no. 30054/96 (May 4, 2001); *McShane v. UK*, (2002) 35 EHRR 23; *O'Hara v. UK*, (2002) 34 EHRR 32; *Brennan v. UK*, (2002) 34 EHRR 18; *Finucane v. UK*, (2003) 37 EHRR 29, *Shannon v. UK*, (unreported) October 4, 2005.

12. See *Stewart v. UK*, (1985) 7 EHRR 453; *X. v. UK*, *Farrell v. UK*, (1983) 5 EHRR 466; and *Kelly v. UK*, (1993) 16 EHRR 20. In *McKay v. UK*, (unreported) October 3, 2006, no breach was found.

13. *Kaya v. Turkey*, (1999) 28 EHRR 1; *Salman v. Turkey*, (2002) 34 EHRR 17; *Cakici v. Turkey*, (2001) 31 EHRR 5; *Ertak v. Turkey*, Appl. no. 20764/92 (May 9, 2000); *Timurtas v. Turkey*, (2001) 33 EHRR 6; *Yasa v. Turkey*, (1999) 28 EHRR 408.

14. *Khashiyev and Akayeva v. Russia*, Appl. nos. 57942/00 and 57945/00 (2006) 42 EHRR 20; *Isayeva v. Russia*, Appl. no. 57950/00 (2005) 41 EHRR 38, and *Isayeva, Bazayeva and Yusupova v. Russia*, Appl. nos. 57947/00, 57949/00, 57948/00 (2005) 41 EHRR 39.

15. UN Commission on Human Rights, "Report of the Working Group on Arbitrary Detention" (February 15, 2006), UN Doc. E/CN.4/2006/20; UN Committee Against Torture, "Conclusion and Recommendations of the Committee against Torture, United States of America" (July 25, 2006) UN Doc. CAT/C/USA/CO/2; UN Human Rights Committee, "Concluding Observations of the Human Rights Committee, United States of America" (September 15, 2006), UN Doc. CCPR/C/USA/CO/3.

5. LANDMAN, THE UNITED KINGDOM

1. Indeed, since the July bombing and increasingly so after the foiled plot to attack trans-Atlantic flights, Britain is struggling to understand how it has become a breeding ground for such radicalism, even though the level of public discourse has descended into offensive and defensive rhetoric about the clash of values, the use of the veil in public, and what is acceptable in a modern democracy.

2. British forces had initially used hooding in its military operations in Iraq to hide the identity of detainees, but then-Defence Secretary Geoff Hoon banned the reinstatement of such practices in late 2003.

3. The government has promised to establish a supreme court that would replace the House of Lords, but it has been unsuccessful in abolishing the position of lord chancellor, a medieval legal institution that has evolved to its modern role in having responsibility for constitutional affairs, royal affairs, and rela-